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No. 92-190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE NEZ PERCE TRIBE, KLAMATH TRIBE AND TULE RIVER TRIBE IN SUPPORT OF THE PETITION OF THE UNITED STATES OF AMERICA

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The Nez Perce Tribe, Klamath Tribe and Tule River Tribe respectfully request this Court to accept for filing the attached brief amici curiae. Respondent State of Idaho has refused to consent to the filing of this brief. The Court should accept this brief because it presents important factual information and argument describing the practical impact of the lower court's decision. The brief demonstrates how the rul-

ing of the Idaho Supreme Court will adversely affect the ability of the United States government to fulfill its trust responsibility to Indian tribes.

In its capacity as trustee, the United States intends to file substantial water right claims on behalf of the Nez Perce Tribe in Idaho's general stream adjudication of the Snake River Basin. Many of these claims will be for instream flows necessary to maintain fishing rights guaranteed by treaty between the Tribe and United States. Under Idaho law, the filing fees for these claims amount to a tremendous expense. The practical effect of the filing fee scheme will be to reduce the ability of the federal government to devote its scarce resources to the merits of the claims of Indian tribes. Ironically, the State of Idaho and other states (that will undoubtedly follow suit) will have a corresponding bonus added to their coffers for use in contesting federal and tribal claims.

While the United States' Petition demonstrates the error in the Idaho Supreme Court's legal analysis, it does not address the critical issue of the ruling's detrimental impact on Indian tribes in Idaho and the potential for harm to Indian tribes in other states. This Court should accept the attached brief for filing as it brings to the Court's attention important reasons for granting the United States' Petition.

Dated: September 8, 1992

Respectfully submitted,

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INTEREST OF AMICI

The Idaho Supreme Court's decision requiring the United States to pay a substantial portion of the costs of Idaho's Snake River Basin adjudication should be reviewed by this Court and reversed on the merits. As set out by the United States' Petition for a Writ of Certiorari, the decision is in direct conflict with this Court's construction of the McCarran Amendment, 43 U.S.C. § 666, and with this Court's law

regarding waivers of federal sovereign immunity. Those arguments need not be repeated here, but amici Indian tribes offer an additional reason for granting the Petition; to prevent the substantial harm that will be visited on the water rights of the Nez Perce Tribe and potentially on other Indian tribes, through the depletion of federal funds ear-marked for technical and legal work required to support the tribes' water rights claims.

Pursuant to the McCarran Amendment, the United States is subject to suit in state court for the determination of the "rights to the use of water of a river system." 43 U.S.C. § 666. Although the sovereign immunity of Indian tribes has not been waived, tribal water rights are held in trust by the United States and thus are subject to quantification in state court proceedings such as Idaho's. Congress did not intend the McCarran Amendment to authorize *federal funding* of state general stream adjudications. Indeed, not only are federal budgets for these adjudications rarely adequate to sustain the federal trustee's obligation to prove and defend tribal water rights; they are wholly inadequate to bear the added burden of millions of dollars of "filing fees" demanded by state water agencies to fund their adjudications. Federal funding of state adjudication proceedings through filing fees is particularly unfair when it is realized that most tribal water claims have been settled out of court without the necessity of extensive judicial proceedings. The Idaho Court's holding that the McCarran Amendment requires the United States to finance the adjudication will substantially impair the United States' ability to fulfill its trust obligation in these typically controversial cases by diminishing the

funds available to obtain the technical and legal studies necessary to support tribal water claims.

Under the "reserved rights" doctrine, tribes often have a priority date senior to all other water users in a basin. Great expense is incurred for work conducted by expert witnesses who document and testify to the historic, present, and future water needs of tribes. The end result is a decree binding on all water users subject to the adjudication. Prior decisions of this Court make it clear that tribes, and the United States on behalf of the tribes, will be afforded but one opportunity to advance and defend their claims—claims that must not only satisfy existing uses, but must also provide for tribes' future needs. The rule of law pronounced by the Idaho Supreme Court approves a mechanism by which states may not only finance their adjudications through the federal treasury, but also unfairly and adversely affect tribal rights.

Important federal rights are at issue in state court cases brought pursuant to the McCarran Amendment. As this Court noted in the course of holding that Indian reserved rights were subject to adjudication in state courts under the McCarran Amendment:

> State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, *any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny* commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983) (emphasis added). The Idaho filing fee scheme and the decision upholding it threaten the tribes' ability to obtain the technical and legal expertise demanded by water cases and hence threaten the substance of Indian reserved rights in Idaho and encourage other states to so hinder tribal rights. Accordingly, the United State's petition for review should be granted.

I. AS A PRACTICAL MATTER, THE DECISION OF THE IDAHO SUPREME COURT WILL SEVERELY UNDERMINE THE UNITED STATES' AND NEZ PERCE TRIBE'S ABILITY TO EFFECTIVELY ASSERT TRIBAL WATER RIGHT CLAIMS

The Nez Perce Tribe inhabits a reservation of approximately 750,000 acres in northern Idaho that was established pursuant to treaties with the United States in exchange for a cession of most of the Tribe's aboriginal territory. 12 Stat. 957 (June 11, 1855); 14 Stat. 647 (June 9, 1863). In addition to retaining a reservation for its exclusive use and occupancy, the Tribe expressly reserved fishing rights. 12 Stat. 957, art. III. This right has since been interpreted to provide a right of up to fifty percent of the available fish harvest. *Sohappy v. Smith*, 302 F. Supp. 899, 911 (D. Oregon 1969);[1] *see Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

In general, when Indian tribes negotiated treaties with the United States they reserved enough water to fulfill the agricultural purpose underlying establishment of their reservations. *Winters v. United States*, 207 U.S. 564 (1908); *see, United States v. Winans*, 198 U.S. 371, 381 (1905). The same conclusions have been reached regarding the reservation of sufficient water to maintain treaty-protected fisheries. *See, e.g., Department of Ecology v. Acquavella*, No. 77-2-01484-5 *Memorandum Opinion* (Yakima Cty. Superior Court, May 22, 1990), *appeal docketed*, No. 57798-6 (Wash. S.Ct.) (treaty language identical to the Nez Perce); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

Idaho commenced its general stream adjudication in 1987. For the past five years the Nez Perce Tribe has been working with the Bureau of Indian Affairs to develop the claims that will be made on behalf of the Tribe. Aside from expending significant amounts of attorney time, the United States has hired biologists, hydrologists, engineers, historians, anthropologists and economists to develop and justify the Tribe's claims. The cost of these services has run into the millions of dollars and the Bureau of Indian Affairs chronically has insufficient funding to perform all of the work and studies needed by the Tribe and the United States. In addition, the federal government provides the Tribe with limited funding to hire its own experts and attorneys to oversee and supplement the claims developed by the United States. Such oversight is absolutely essential given this Court's ruling in *Nevada v. United States*, 463 U.S. 110 (1983) that the United States is not held to the high fiduciary standards of a private trustee in water rights cases.[2]

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[1] A description of the lengthy history of this litigation is found in *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990).

[2] Here, as in *Nevada*, the government may assert claims on

If the Bureau of Indian Affairs is required to pay the exorbitant "filing fees" at issue in this case, the funds available to prepare for the merits of the case undoubtedly will be diminished. The removal of at least ten million dollars from the limited financial resources available to assert claims on behalf of the Tribe could sound the death knell for water rights necessary to support treaty fishing rights. It is not feasible for tribes simply to seek additional appropriations to cover the cost of filing fees. It is well known that Indian tribes are, among the minorities in this country, the most politically weak. History demonstrates the practical difficulty tribes have had in obtaining federal protection of their rights. As the National Water Commission stated in 1973, "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters." Nat'l Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States 475 (GPO, 1973).

Idaho's filing fee scheme also frustrates the overriding federal objective of settling Indian water cases, and precludes the United States from adequately preparing claims for litigation. *See* 55 Fed. Reg. 9223 (March 12, 1990) (announcing Executive Branch Policy of pursuing negotiated settlements of Indian water right claims). Under the Idaho scheme, the Nez Perce claims must be filed by late March of 1993. If the Bureau of Indian Affairs is compelled to pay the fees claimed by Idaho, it is doubtful that adequate financial

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behalf of other federal agencies that conflict with Nez Perce claims.

resources will remain to adequately prepare the Tribe's water right claims *and* commence negotiations. Rather, the limited resources of the Bureau of Indian Affairs will need to be conserved for litigation purposes.

II. THE DECISION OF THE IDAHO SUPREME COURT WILL LIKELY HAVE A DISASTROUS EFFECT ON OTHER TRIBES SUBJECT TO GENERAL STREAM ADJUDICATIONS IN STATE COURTS

In Oregon the United States is facing state administrative proceedings to quantify federal and, as the Klamath Tribe's trustee, tribal water rights in the Klamath River Basin Adjudication in southern Oregon. The existence of the tribal rights was declared in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), but the quantification was left to later state court proceedings. The tribal rights—including those to some 400 miles of streams—principally are for water to support treaty-protected fishing, hunting, and gathering activities. *Adair* at 1410. These water rights are essential to the survival of the Tribe since the various fish and wildlife species upon which the Tribe depends are themselves dependent on an adequate supply of water.

Oregon, like Idaho, asserts authority to exact "filing fees" from the United States, on pain of forfeiture of federal water rights, to "pay for the expenses of the [Water Resources] department" in registering and determining water rights claims. Or. Rev. Stat. §§ 539.081(4) and 539.210. The statutes are ambiguous as to the amount of fees for large federal water claims such as those for instream flows, wetlands, or lake

maintenance. *See* Or. Rev. Stat. § 539.081(1).[3] Oregon is experiencing sharp budget restrictions brought on by a ballot initiative capping and rolling back property taxes. The state is increasing its resort to "user fees" to finance many state agency activities. In this fiscal atmosphere there is little doubt that Oregon, following Idaho's lead, will interpret its "filing fee" statutes to exact sufficient fees from the United States to bankroll the state water agency. If Idaho is successful in collecting ten million dollars from the United States, Oregon likewise may structure its fee regime to exact fifteen to twenty million dollars, or perhaps even more. The harmful effect of such exorbitant fees on the water rights of the Klamath Tribe cannot be underestimated. Quantification of the Tribe's water rights involves a determination of the water needs of fish and wildlife. As with all tribal water claims this is a complex and expensive undertaking requiring hydrologic, biological, engineering, and other professional expertise. Even if fees are not exacted for non-consumptive tribal claims, the federal government will be forced to pay fees for claims made by the Forest Service and other agencies. As a practical matter this will diminish the amount of funding available to perfect tribal claims.

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[3] These fees were unsuccessfully challenged in *United States and Klamath Tribe v. State of Oregon, Dep't of Water Resources*, 774 F. Supp. 1568 (D. Or. 1991). The statute presently exempts the United States' claims for non-consumptive uses on behalf of Indian tribes from the fee schedule. Or. Rev. Stat. § 539.081(2). The state claims the right to charge the tribe fees for other reserved right claims. Based on the reasoning of *Tule v. Washington*, 315 U.S. 681 (1941), the district court rejected the state's argument as to the tribe, but the United States must pay fees for claims it makes on its own behalf.

No separate federal budget provision is made for filing fees. If the fees as eventually calculated by Oregon are of the same magnitude as those demanded by Idaho, the fees will be much larger than the annual federal budget available for proof and defense of the Tribe's water rights. Payment of the fees will reduce the already inadequate federal funds available. In the end, the ability of the United States and the Klamath Tribe to defend the Tribe's water rights will be compromised because of the State's exaction of "filing fees" from the United States.

The Tule River (Yokut) Indians inhabit a reservation established in 1873 by executive order and located in the foothills of the Sierra Nevada Mountains. I Kapp. 830-31 (GPO, 1904). Although the Tule River Indians have continuously used the waters of the South Fork Tule River, the Tribe's water rights have not been formally adjudicated. Indeed, most Indian tribes in California have not had their water rights adjudicated. Of the nearly 100 tribes located in California only five have adjudicated water rights.[4]

If allowed to stand, the Idaho Supreme Court's decision will likely have a serious, adverse impact on future water adjudications in California. It is a matter of common knowledge that the State of California currently is experiencing serious financial difficulties. Meanwhile, California has experienced drought conditions for five of the past seven years, resulting in increasing demands and pressures on its scarce water resources. It is quite likely that in the next few years

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[4] These are the Agua Caliente and the Morongo Reservations, which share a 1938 Decree, and the Cahuilla (1962), Greenville (1954), and the Grindstone (1930) Reservations.

proceedings will be initiated in California to quantify tribal reserved water rights to obtain a secure quantity and source of water. *See Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 811 (1976) ("ubiquitious nature of Indian rights in the Southwest" calls for adjudication of such rights). California's current adjudication system only charges a nominal flat fee for filing a notice of water claim,[5] and equitably apportions the costs and expenses of the adjudication against the parties.[6] In light of both the budget and water crises in California, as well as impending pressure to adjudicate Indian water rights, California will be hard pressed not to adopt a statute designed to exact from the United States the bulk of the cost of water adjudication proceedings to quantify tribal water rights.

CONCLUSION

Idaho's attempt to force the United States finance its general stream adjudication is inconsistent with the meaning of the McCarran Amendment. Surely Congress could not have intended that the United States pay the bulk of the cost of state court general stream adjudications when it adopted the McCarran Amendment. If this Court does not grant the United States' Petition, the Nez Perce Tribe will suffer direct and immediate adverse consequences. Moreover, other western states will undoubtedly follow Idaho's lead and thereby further impair the federal government's

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[5] *See* Cal. Water Code § 2850 ("at the time of submission of proofs [of claim], the Board shall collect from each claimant a fee of ten dollars ($10.00) for each proof filed by the claimant").

[6] *See* Cal. Water Code §§ 2500 - 2852 (expenses in statutory adjudications).

ability to fulfill its trust obligation to Indian tribes. Because the Idaho Supreme Court incorrectly interpreted the law and because that ruling will have great local and nation-wide impact, the Unit
ed States' Petition should be granted.

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